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No. 92-1662

Supreme Court, U.S.
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AUG 12 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APRIL 15, 1993
CERTIORARI GRANTED: JUNE 28, 1993

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

Case No. 1:91-CR-01

UNITED STATES OF AMERICA

v.

RALPH STUART GRANDERSON, JR.

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/3/91	1 INFORMATION filed. Ralph Stuart Granderson (1) counts 1 (paw) [Entry date 01/04/91]
	* * *
1/11/91	4 Arraignment held before Judge William C. O'Kelley as to Ralph Stuart Granderson, Jr. PLEA OF GUILTY by Ralph Stuart Granderson (1) count(s) 1. Case assigned to Judge William C. O'Kelley . . (pt) [Entry date 01/15/91]
	* * *
3/18/91	— Sentencing of Relph Stuart Granderson (1) count(s) 1. CNT 1: 5 yrs. supv'd release under direction of USPO w/standard & spec. conditions of prob.—Fine \$2,000—Spec. assessment \$50.00, (pt) [Entry date 03/20/91]
	* * *

DATE	PROCEEDINGS
7/29/91	— PROBATION REVOCATION HEARING HELD before Judge William C. O'Kelley. Defendant ADMITTED ALLEGATIONS as set forth in the petition. Court finds defendant has violated conditions of probation. REVOKING PROBATION Ralph Stuart Granderson (1) count(s) 1 (yrm) [Entry date 08/02/91] * * * *
8/2/91	12 Sentencing of Ralph Stuart Granderson (1) count(s) 1. CNT 1: 5 yrs. supv'd release under direction of USPO w/standard & spec. conditions of prob.—Fine \$2,000—Spec. assessment \$50.00—ORD. PROBATION REVOKED 8/2/91—CBOP 20 MOS.—3 YRS SUPV'D REL (imposition of sentence deferred until 8/26/91). (pt) [Entry date 08/05/91] * * * *
8/9/91	13 NOTICE OF APPEAL from modify sentence [12-1] for on or about August 3, 1991 by defendant Ralph Stuart Granderson Jr. (pt) [Entry date 08/12/91] [Edit date 08/12/91] * * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-8728

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

DATE	PROCEEDINGS
8/13/91	Dup. Notice of Appeal and D.C. Docket Entries & Order * * * *
6/29/92	Case Argued * * *
8/4/92	Opinion Rendered * * * *
11/30/92	Order Denying Rehearing * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:91-CR-101

UNITED STATES OF AMERICA

v.

RALPH STUART GRANDERSON, JR.

CRIMINAL INFORMATION

THE UNITED STATES ATTORNEY
CHARGES THAT:

From on or about June 2, 1990, and continuing up to and including June 20, 1990, in the Northern District of Georgia, the defendant RALPH STUART GRANDERSON, JR., being employed as a Postal Service Carrier, did unlawfully secret, destroy, detain, delay, and open mail which had been entrusted to him and had come into his possession, that is, eight (8) pieces of First Class Mail, identified as follows:

<u>Addressed To:</u>	<u>Return Address:</u>
1. Debra Lynch 1728 Wayland Circle Atlanta, Georgia 30319	Bernice B. Lynch 308 S.W. 3rd P.O. Box 391 Gilmore City, Iowa 50541
2. Ms. Jackie Morris 2697 N. Thompson Road Atlanta, Georgia 30319	Uncle Roy 203 Fern Vale Cincinnati, Ohio
3. David & Karen McConnell 3858 Ashford Road Atlanta, Georgia 30319	Unknown
4. Mrs. Teresa Campbell 2854 Redding Road Atlanta, Georgia 30319	609 Carolyn Court Birmingham, Alabama 35012

5. Ms. Jackie Morris 2697 N. Thompson Road Atlanta, Georgia 30319	Noelle Mann 7071 Georgetown Street, N.E. East Canton, Ohio 44730
6. Debra Lynch 1728 Wayland Circle Atlanta, Georgia 30319	Nancy Lyon 602 Friendship Lane Jamaica, New York 11402
7. Karen McConnell 3858 Ashford Road Atlanta, Georgia 30319	3801 West Palm Drive Miami, Florida 33156
8. David McConnell 3858 Ashford Ridge, N.E. Atlanta, Georgia 30319	B. Lane 16 Greevesway Pittsburgh, Pennsylvania

which were intended to be conveyed by mail, all in violation of Title 18, United States Code, Section 1703(a).

/s/ Joe D. Whitley
JOE D. WHITLEY
United States Attorney

/s/ Janet F. King
JANET F. KING
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Docket No. 1:91-CR-01

(Title Omitted in Printing)

**PETITION ON PROBATION AND
SUPERVISED RELEASE**

COMES NOW James G. Heflin, Jr. PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Ralph Granderson who was placed on probation by the Honorable William C. O'Kelley sitting in the court at Atlanta, on the 18th day of March, 1991, who fixed the period of probation supervision at five years, and imposed the general terms and conditions of probation theretofore adopted by the court and also imposed special conditions and terms as follows:

The defendant is prohibited from possessing a firearm or other dangerous weapon.

The defendant shall participate, if any time being necessary and required to do so, in any program approved by the U.S. Probation Office for substance abuse, which may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

**RESPECTFULLY PRESENTING PETITION FOR
ACTION OF COURT FOR CAUSE AS FOLLOWS:**

Probationer has possessed/used drugs in that on 5-10-91 and 6-7-91, probationer rendered urine samples which tested positive for cocaine metabolite.

PRAYING THAT THE COURT WILL ORDER Ralph Granderson to appear in Court in Atlanta, Georgia, in Courtroom 1906, 75 Spring Street, S.W., on July 29, 1991, at 10:30 A.M., to show cause why his probation should not be revoked.

ORDER OF COURT

Considered and ordered this 19th day of July 1991 and made a part of the records in the above case.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

Respectfully,

/s/ James G. Heflin, Jr.
JAMES G. HEFLIN, JR.
United States Probation Officer
Atlanta, Georgia

Date: June 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Title Omitted in Printing)

TRANSCRIPT OF REVOCATION OF PROBATION

Before the Honorable WILLIAM C. O'KELLEY, Chief United States District Judge, on Monday, July 29, 1991, in Courtroom 1906, nineteenth floor, United States Courthouse, in Atlanta, Fulton County, Georgia, in the above-styled action.

APPEARANCES OF COUNSEL:

For the United States: Janet King

For the Defendant: Gregory Smith

[2] (In Atlanta, Fulton County, Georgia; Monday, July 29, 1991; 10:30 A.M.; in open court.)

THE COURT: Is Granderson in custody?

MR. SMITH: No. He's out here.

THE COURT: All right.

THE CLERK: Call the case United States of America versus Ralph Granderson, Criminal Number 1:91-01. Is the government ready?

MS. KING: The government's ready, Your Honor.

THE COURT: Mr. Smith, are you ready? You've got this one also?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. All right, have you received a copy of the government's application for probation revocation in this case?

MR. SMITH: Yes, Your Honor.

THE COURT: How do you respond to it?

MR. SMITH: Your Honor, we admit the charge.

THE COURT: You admit the charges?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Mr. Granderson, is there any reason that the court should not revoke the probation in this case?

Or is there any reason you wish to state, Mr. Smith?

MR. SMITH: I'm sorry. Just one minute.

[3] Your Honor, I think that the points we would want to make are these. As Your Honor may know, we believe the court has discretion to impose a sentence in this case. As I understand it—I guess maybe I should start with asking what the government intends to seek in this case.

MS. KING: Your Honor, the government's position is that as pled by the petition for revocation, that the defendant has possessed or the probationer has possessed and used drugs. If the court makes that findings, there is a mandatory revocation under 3565 subsection (A), that the court would have to revoke and impose at least one-

third of the five-year original sentence. Therefore, that would be the court's position—the government's position, excuse me—that the court under these facts must revoke under the statute and impose not less than 20 months.

MR. SMITH: Your Honor, perhaps I should clarify the admission then. Mr. Granderson admits use of drugs but does not admit possession in the terms that the government has indicated, and I believe that in circumstances where the use is indicated from the drug testing, which it was here, the court has the discretion not to impose the mandatory one-third, and that's what we would ask the Court to do here.

If the court may recall, Mr. Granderson has no prior criminal history at all except for the underlying offense, which did not relate to drugs at all. It was mail theft. During the [4] pretrial services' report Mr. Granderson was out on bond for a substantial period of time, had no problems whatsoever, was drug tested periodically during that time, never tested positive at all. No indication he's ever had any drug problems. This related to a mistake he made in terms of getting I guess in a sort of party setting and doing something he shouldn't have, but we submit that 20 months would be unduly harsh, given his background and the circumstances, and we would ask the Court that the Court impose a sentence below the 20 months requested by the government.

In the case of *United States versus Smith*, which is an eleventh circuit case from last year, 907 F. 2d 133, the court talks about ways to do revocation under the guidelines. This was before the new guideline had been implemented which said where within the range the court ought to impose sentence, and the *Smith* case said that the court should go back to the original sentencing range, which in this case would be zero to six months, and impose a sentence within that range. I think that the *Smith* case may not be applicable now that the guidelines have

indicated specific revocation guidelines as well, but nevertheless at least under *Smith* the court at that time perhaps could have been limited to the zero to six month range.

Because he's a criminal history category 1, I would also note to the court that but for the mandatory revocation, assuming that this would be a grade (C) violation a technical [5] violation—at least in terms of parole revocation, drug use is a technical violation—his range would be three to nine months. So, again, Your Honor, we're talking about ranges well below the 20 months that the government's seeking in this case.

We submit that the court, given Mr. Granderson's good background—he's been a hard-working fellow for a long time and he's never been in trouble before in his life until this underlying offense and violation. He's not particularly a young man either, so he's led a good life for a substantial period of time. We ask the court to exercise its discretion, to find that the use was demonstrated by Mr. Granderson's drug testing only and exercise its discretion to go below the 20 months and impose a sentence that might be more appropriate in this case. He's never been to prison, and we submit that 20 months is a substantial period of time for a drug test.

MS. KING: Your Honor, the government's position is that there's no way that Mr. Granderson used the drugs unless he possessed them and that it would be appropriate for the court to find that he was in possession of the drug, in violation of the guidelines and in violation of the statute, and should therefore apply the mandatory revocation.

For the record, I'd like the Court to note that the government's position is that according to our review of the *Smith* decision and discussions with the department of justice, would be that the court would have to abide by *United States [6] versus Smith* if you do not find a mandatory revocation and therefore the sentence would have to be imposed within the original guideline

range of zero to six months. If the court felt that that was not appropriate, I did want to let the court know that I spoke with Mr. Heflin, and the probation office's figures that they provided to you under chapter 7 of 12 to 18 months of revocation are incorrect. They had figured that the possession or the usage of the cocaine would be a felony. Of course, as the court's aware, that's only a misdemeanor. So, the chapter 1 guidelines are three to nine months, as Mr. Smith noted.

Therefore, the three possibilities in this case are that the court would find that the use of the drugs as admitted by the defendant constituted possession and revoke for the 20 months or apply Smith. That would be—the zero to six months would be the range, unless the court felt that Smith was not binding on you, and you would apply Chapter 7, which would be three to nine months.

THE COURT: Just a minute. Let me review something.

MS. KING: All right, sir.

THE COURT: I'm not sure that I agree with the interpretation of the mandatory revocation and sentence to at least one-third of the original sentence. I don't quarrel with that principle of law. The question is: What was the original sentence? In this case there was no original sentence to jail. Has that been interpreted to be the minimum sentence—

MS. KING: No, Your Honor.

THE COURT: —authorized by statute, which was five years?

MS. KING: Your Honor, if the Court—let me see if I can find it. There is no longer the guidelines where the Court suspends imposition of sentence.

THE COURT: I realize that. That was the old way of doing it.

MS. KING: Right. Five years was the sentence. The Court allowed it to be served on probation. It is the government's position that the original probation period

of five years was the original sentence, and I'll refer the Court to Section 3561 of Title 18 that indicates that a period of probation constitutes a sentence. Guideline Section 7A2(a), little (a) (provides that a period of probation under the guidelines is a sentence. Therefore, in interpreting 3565, the government's position would be that the probated sentence that the court gave is the original sentence that is referred to in the revocation language, a period of probation. It's very hard and I had difficulty conceptualizing probation as the sentence, but that is the interpretation.

THE COURT: Well, that's been the concept in the state court system in the past, so I don't have much trouble understanding it. I don't like the analysis, but I don't have [8] any problem understanding that's what they're saying. That's the way I think the state court sentences have operated for years; that whatever the probationary term was, that was the sentence, I believe. That again is where we've gotten away from the traditional old federal system, which I thought was a fairer, more progressive system, because frankly had I been going to sentence him to jail, I wouldn't have sentenced him to five years. So, I give him a break and sentence him to five years probation, and now when he violates it he's subjected to four times what he would have been—well, more than that really. 10 times. He's subjected up to five years, 60 months; whereas, otherwise he would have been subjected only to six months, so it's 10 times as much. There's just something wrong with that, but there's a lot wrong with the guidelines. I will retire from this court before anybody ever convinces me that they're fair.

MR. SMITH: Well, in this case, Your Honor, I think the guidelines give the court an out. In application note 5 to 7B1.4, after citing the statutory provisions about the mandatory one-third, it states as follows: the Commission leaves to the court the determination of whether evidence

of drug usage established solely by laboratory analysis constitutes, quote, possession of a controlled substance, end quote, as set forth in the statutes. And, Your Honor, while it may—

THE COURT: I have difficulty with that and that's the same way the Commission—you know, they compromise their [9] principles. I've heard those Commissioners say, "Oh, you're not bound by these guidelines. You can depart whenever you want to." Well, that's not what they say and that's not what the law says and I've not done that. They've written them one way and then they tell us something different and I don't agree with them. Even though I don't like the guidelines, I intend to apply them as I understand them as best I can. Now, what you're saying here is they have said this is the guideline, but if you're willing to compromise your findings—and that's in effect what you're doing in my judgment. If you've taken drugs and you have it in your system, then you've possessed those drugs. They're saying, "Well, you can find differently." Well, I have difficulty with that.

MR. SMITH: I understand the Court's feeling. I guess my thought is as to why the Commission did that is this: it's a policy determination. I think finding someone in possession is actually viewed as worse than actually having them and used it; and what was it that Congress meant when they said possession of a controlled substance? If you find somebody in possession, well, they might be distributing.

THE COURT: No. The difference with that is possession with the intent to distribute and possession. Possession is possession.

MR. SMITH: Well, I understand, but finding possession always carries with it a possibility of distribution, whether [10] they can prove that or not. And I guess what I'm saying is mere usage through a drug test, that has already been ingested and there's no potential even

that that can hurt someone. And so I guess what I'm saying is the Commission felt like rather than assuming that usage always was as evil as possession, that they leave it to the Court to determine in the particular case.

THE COURT: Well, I think usage is pretty bad, frankly.

MR. SMITH: I understand.

THE COURT: If we didn't have the usage, we wouldn't have the dealing in.

MR. SMITH: Well, I understand, but in terms of the—

THE COURT: So, I don't have any problem with dealing with users, because when people quit using it, there won't be a market for it.

MR. SMITH: Well, I understand that, but in terms of the one-third revocation, he's clearly going to get revoked here. I mean, that's why we're here.

THE COURT: That's right.

MR. SMITH: But the issue is whether the usage is as evil as the possession where there should always be a mandatory one-third revocation, and I submit that it's up to the Court in this case, and the Commission expressly says that determination's up to the Court. So, I don't think it's doing violation to the guidelines for the Court to find that way. In this case where you've got a guy who has worked hard all his life and has never [11] been to prison, I don't think 20 months is necessary to teach him his lesson at all. And as the Court notes, the maximum he would have gotten would have been six months.

THE COURT: Would have been six months under the guidelines.

MR. SMITH: Exactly.

THE COURT: And I don't have a bit of problem with, you know, if you had an opportunity to get six months and you didn't, but you go out there and you don't keep your nose clean, then you can get more than that. I don't have a problem with that. But 10 times more or a mandatory four times more—

MR. SMITH: Yes, Your Honor.

THE COURT: —is a little harsh. But that's what you get into when you start dealing with statistics and mathematics instead of human beings.

What is that section again? Let me read it.

MS. KING: The statutory section, Your Honor—

THE COURT: Yes.

MS. KING: —or the guideline section?

THE COURT: Well, both, I guess.

MS. KING: It's 3565 of Title 18.

THE COURT: 35—

MR. SMITH: 65(A).

MS. KING: (A), Title 18.

THE COURT: Well, I think Congress has spoken. I don't [12] know that I have any choice in it, Mr. Smith.

MR. SMITH: If the Court would look at application note 5.

THE COURT: Of the guidelines?

MR. SMITH: Of the commentary.

THE COURT: Of the guidelines, you mean?

MR. SMITH: Yes, Your Honor.

THE COURT: I don't think the guidelines can amend the statutory provision.

MR. SMITH: I agree with that, Your Honor, but the guidelines say that the definition of possession is an open question as to whether possession always equals use for purpose of the mandatory one-third. They explicitly say that—and I think it is an administrative agency interpreting the statute—their interpretation should be given some deference by the Court. It claims that it's an open question with the Court as to whether use has to constitute possession.

THE COURT: It is, it's an open question, and this Court I think has already decided in other cases and will decide here that there's no way that you can ingest it without possessing it.

MR. SMITH: Well, Your Honor, if someone mixed something in a drink and you—

THE COURT: Involuntarily gave it to you. In that instance I think that would be a legal defense and you shouldn't [13] admit, you know, the offense. I think that would be an involuntary possession of it, and as far as I'm concerned, it wouldn't constitute a criminal act, period. And I wouldn't revoke the probation under any circumstances if someone had dropped him a mickey, if that's what you're saying.

MR. SMITH: Well, it's awfully difficult to prove that, Your Honor, and I guess those considerations come into play as well. The Court would have difficulty believing someone involuntarily—

THE COURT: Probably would, but if that's what happened—but in absence of that happening, there has to be possession as far as I'm concerned.

MR. SMITH: The policy argument that possession would carry with it other possibilities that use wouldn't I guess is not persuasive with the Court.

THE COURT: Not to me. If Congress wanted that, they should have said it. They've made distinctions in their drug statutes by distinguishing simple possession from possession with intent to distribute, and if they wanted to distinguish in this particular statute anything other than possession, they should have done so. Now, I don't like what they did, but there are a lot of things Congress does I don't like, a lot of things.

MR. SMITH: Yes, Your Honor.

THE COURT: But I still endeavor in my own conduct both to obey what they do and in my professional life to implement [14] what they say, whether I like it or not.

MR. SMITH: Well, that's what makes you a good judge, that you don't legislate, and I understand that. I guess my only thought was that if Congress really meant this as clear as the Court feels, they could have written in "drug usage." They did not. They wrote simply "possession," and I think that for that reason it's

open with the Court. It would have been very easy for them to do that.

THE COURT: That's right, but they didn't, because my view is that drug usage is considered drug possession. They didn't need to. I mean, if you use it, you have to possess it. There's no way you can use it without possessing it. Even if that possession is just momentarily for the minute or the few seconds that it takes to take it from someone else and to ingest it, whether it's done by whatever the various means are: with needle, intravenously, orally or nasally, and I guess there are other ways. I don't know. But I've heard testimony as to those three ways.

MR. SMITH: Yes, Your Honor. I guess the only other point I might make is that even if he were to be convicted of a possession, simple possession, it would be, as the Court knows, a misdemeanor with a maximum of a year.

THE COURT: And I have difficulty understanding—well, of course, he's not being sentenced for a violation supposedly. He's being sentenced for the original offense. And [15] this is highly inconsistent. I have difficulty with it, Mr. Smith, and you obviously know I do and you're persisting to try to convince the Court differently.

I have real difficulty with it. I think it's just another one of the inconsistencies in the system, and when you start applying a bunch of numbers in a very drastic method, as have been done—Congress is the one who set this statute, so I shouldn't really be criticizing the guidelines now. This is strictly congressional. Because what you're trying to ask me to do is to shift to the guidelines, because if we shifted to the guidelines, we'd do it much easier and I would certainly not impose the 20 months under the guidelines. But under the statute, I feel that I'm compelled to do it as I'm compelled in many other mandatory minimum sentences.

I imposed last week or the week before—last week, I guess it was, or the week before—some mandatory mini-

mum sentences that were just—there's no other way to describe them other than they're harsh. Well, even by my standards let me say they're harsh, and my standards are not known to be lenient.

MR. SMITH: So, do I gather then the Court—

THE COURT: I just don't feel I have any choice but to revoke probation and impose 20 months—

MR. SMITH: All right.

THE COURT: —under the statute, and I frankly don't like it.

[16] MR. SMITH: I'm relatively new at this job and I don't know—if that's settled, and it sounds like it is, I don't know if this is the appropriate way of doing it, but there is one additional matter I'd like to take up with the Court before the Court imposes sentence very briefly.

THE COURT: Sure. No, you go right ahead. You represent your client.

MR. SMITH: Your Honor, at the time the original sentence was imposed Mr. Granderson was in the zero to six month range. He had a base level of 6 under the guidelines presented by the probation officer and we filed an objection as to whether his underlying offense had been properly put in the base level of 6 or whether it should have been moved to a different guideline for—I think it was tampering with mail, which was only a level 4. The Court asked whether it made a difference and I indicated that since it was zero to six I didn't think it did.

In retrospect, Your Honor, now that we're at revocation time, I think it did make a difference. Had he been a base level 4 rather than a 6, the Court's maximum sentence would have been three years of probation rather than five years of probation, and I guess I would ask the Court to reconsider its earlier ruling that he be put on five years probation and perhaps consider the possibility of revising that. It would be an illegal sentence of five years if the other guideline had been used in this case.

THE COURT: I have difficulty with that, Mr. Smith,

[17] because I don't think I can modify the sentence at this time. And in some ways I'm glad to be rid of old Rule 35, but I don't think it's fair. The biggest headache I ever had was everybody always wanting me to modify the sentences up to 120 days. But, you know, if you've made a mistake or you've had a second thought about something, you can't redo it now. I would in my own conscience rather try to reason my way through that statutory language into what you were suggesting rather than try to do what you now suggest. I consciously could find it easier probably—

MR. SMITH: Yes, Your Honor.

THE COURT: —to do it the other way.

MR. SMITH: I don't like mentioning it myself, Your Honor.

THE COURT: That's all right.

MR. SMITH: For the record, Your Honor, I would note that there are some—I understand this Court has not, but there are some judges in this district that have found that use does not necessarily equate with possession and have imposed sentences beneath the one-third mandatory minimum.

THE COURT: That may be, and if there's some appellate authority that says that, then that's law for me to follow. But in absence of Eleventh Circuit or Supreme Court appellate authority to the contrary, I must interpret the law, and I think the interpretation is the way I've said it. It's not an interpretation I like.

[18] MR. SMITH: Yes, Your Honor.

THE COURT: Now, if somebody else either sincerely believes that or they find that as an expedient way to get out from doing something they don't want to do—and I'm not going to do that because I think my oath says I shouldn't. If you start changing the law to suit one situation, then you'll do it for another, and I'll do my job and Congress will do theirs. Congress did theirs and I'm trying to do mine under it. And I don't like what they

did. If they don't like it, then they should come back and change the law so that I can fit within it. And I'm very sympathetic with your argument. You don't have to apologize for trying to make them. You represent your client; that's what I want you to do. That's what I would do, what I did when I was there. Even though I reject your arguments, there's nothing wrong with your trying to make them.

All right. In case number 91-1, on the admission of the violation of conditions of probation, the Court finds the defendant's violated the conditions of probation in this case, and pursuant to section 3565—is it (A)? I believe it is.

MS. KING: Yes, sir.

MR. SMITH: Yes, Your Honor.

THE COURT: Of Title 18 of the United States Code, revokes the probation and sentences the defendant, Ralph Stuart Granderson, Jr., to 20 months custody of the Bureau of Prisons, and in addition thereto, to three years of supervised release to [19] follow. All right, anything further?

MS. KING: Your Honor, we haven't discussed whether or not the Court is going to allow the defendant to surrender or remand him to custody.

THE COURT: He's free now, right?

MS. KING: That's correct, sir.

MR. SMITH: He wasn't even on bond. Well, he may be on bond. He appeared today, Your Honor.

THE COURT: What's your request?

MR. SMITH: We would request voluntary surrender.

THE COURT: I'll defer execution. Do you have any objection to it?

MS. KING: No, Your Honor.

THE COURT: I see no problem with that. I'll defer the execution of that sentence and direct that the imprisonment portion of the sentence be deferred until—Judy, I don't have a calendar. If you'll give me a date or something.

How much time do you want or need? You'd like 20 months, wouldn't you?

MR. SMITH: We'd like an appeal bond, Your Honor, if that's possible.

THE COURT: Well, I don't object to your appealing this, certainly. Frankly, I would otherwise sentence him to something in a year range. I think you could probably get an appeal decided before that would be up anyway. I would hope you [20] would appeal it and win. I don't often like to be reversed, but if you did it, it would be a case that wouldn't bother me on the interpretation of the law issue.

MR. SMITH: Yes, Your Honor.

THE COURT: The facts is something different, because I find within the meaning of the statute that he possessed cocaine, I believe it was.

MS. KING: Yes, Your Honor.

MR. SMITH: Yes, Your Honor.

THE COURT: I believe it was cocaine. All right, I will defer the execution. That's what we were looking at. I'd say October—I mean August the 26th. That's a month.

MR. SMITH: Thank you, Your Honor.

THE COURT: All right, anything further?

MR. SMITH: No. Thank you, Your Honor.

MS. KING: No, Your Honor.

THE COURT: All right, we'll recess till further order.

* * * * *

(Hearing concluded)

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(Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Title Omitted in Printing)

TRANSCRIPT OF RESENTENCING

Before THE HONORABLE WILLIAM C. O'KELLEY, Chief United States District Judge, on Friday, April 23, 1993, in Courtroom 1906, nineteenth floor, United States Courthouse, in Atlanta, Fulton County, Georgia, in the above-styled action.

APPEARANCES OF COUNSEL:

For the United States: JANET KING

For the Defendant: GREGORY SMITH

[2] (In Atlanta, Fulton County, Georgia; Friday, April 23, 1993; in Open Court.)

THE CLERK: Call the case of the United States versus Granderson, Criminal Number 91-01. The government ready?

MS. KING: Ready, Your Honor.

THE CLERK: The defendant ready?

MR. SMITH: Yes, Your Honor.

THE COURT: Okay. Is there anything further? I believe this case is back for resentencing. And you've filed motions and briefs on your position I believe, Mr. Smith.

MR. SMITH: Yes, Your Honor.

THE COURT: Anything further you wish to say?

MR. SMITH: Your Honor, if I might just briefly review our position. If the Court doesn't feel it's necessary, I won't, but obviously when the Court imposed 20 months, supervised release was mandatory. When the Eleventh Circuit found that the maximum was six months, under the guidelines it became discretionary. And, Judge, the reason that we're asking that Mr. Granderson be removed from supervised release is—there are three reasons. First, the court of appeals didn't suggest that it would be necessary. It said that if supervised release is imposed on remand, that it's discretionary with the Court.

And, Judge, I would note Mr. Granderson has served more than the six months that the court of appeals found was the maximum. He served about 11 months before the ruling came down. [3] So, he has served five extra months that he has not gotten credit for and will not as long as he stays on the straight and narrow, as he has up until now. Because of that, because of the fact that he's served five months of unnecessary incarceration—at least at this stage it's unnecessary—we submit that that's plenty of punishment here and serves the purposes of the overall statute, overall punitive effects of the statute. That is our main reason. It's just out of equity,

Judge. It seems like to impose additional supervised release would be unnecessary.

Second, Judge—and this is real important, too. The Court of Appeals made it clear that his supervised release term doesn't start from the end of that six-month period but starts at the end of when he was let out. So, it's important for the Court to understand that rather than ending in February, which would have been when his six months ended, it doesn't start until August.

Third, and most importantly, Judge, is that Mr. Granderson has done a good job on supervised release. I believe the Court has a copy of a letter from Mr. Wolinski, his probation officer, and it says that he's doing everything according to plan.

The purpose of probation and revoking probation is to give somebody their first taste of jail. This was Mr. Granderson's first taste of jail. He'd never been to jail before. Since he's been out he has been a model supervisee, I [4] guess is the word I'm looking for. He hasn't done anything wrong, no turning back. The letter I think speaks for itself.

And the bottom line is, Judge, if Mr. Granderson had gotten out—if you look at it a couple of different ways, it would be the same. If he had gotten his original six months and three years of supervised release that he's doing a good job of like he's doing now, we would have asked for an early termination, and that early termination he would have been eligible for in February or before February. If he had gotten out in February like he was supposed to, after the court revoked his probation, and gotten three Years starting then, again we're eligible to come to the Court after a third of his supervised release and ask for early termination. Again, that would have been February.

Mr. Granderson, although the Eleventh Circuit essentially remanded this for the issue of supervised release, has been doing the right things and not—I told him “to

assume you're on supervised release," even though there's some legal question as to whether he was. He's been reporting regularly, doing everything he could. I think that the Court can feel comfortable that the taste of jail has served its intended effect, particularly when the overall circumstance of the case—and the Eleventh Circuit specifically said that this court should consider the need for supervised release, quote, in light of all the events and circumstances of this case, meaning, of course, I [5]—you know, I don't know what they mean for sure, but it seems to me that what they might have been meaning is the fact that he served more than six months, which was the max he was supposed to get.

Judge, This is a legal issue that may be decided by the Supreme Court, the ultimate issue here. The government has moved for certiorari. I can update the Court on what the courts have done since then. I have sort of mixed personal feelings. You know, when the government moves for cert. I sort of—I've never felt this sort of conflict before. It would be a lot of fun to go up there, but at the same time, zealously representing my client, obviously I don't think it should go there.

If the court wants a quick update, there were two that had found in Your Honor's favor before the middle of 1992. Since that time the Third Circuit and then this Circuit found the way that it did. They then went back to the Ninth Circuit, which had been one of those two originally. That court rejected the Eleventh Circuit's and Third Circuit's reasoning and held to their original decision. Since that time there have been two other circuits that have come out in favor of the Eleventh and Third Circuits. So, there is a serious split here, just for the Court's edification, as to how his may come out. I certainly understand in any event why the court originally imposed 20 months. I think it was a reasoned decision that may be ultimately—

[6] THE COURT: The Cert. application on the split then is in the Granderson case, not in some other case.

MS. KING: That is correct, Your Honor.

MR. SMITH: It is in this case, Your Honor.

THE COURT: This is a good one for them to address it on.

MR. SMITH: Yes, Your Honor.

THE COURT: I think I made the issues clear.

MR. SMITH: I think you did, and your opinion is cited as an appendix in the government's cert. petition, as it has to be. The bottom line though I think is: as the law stands now in this circuit, Mr. Granderson has served five months more than he was supposed to under the law of this circuit. If that changes, obviously he'll be sent back to prison. But as it stands now, given the fact that he's served five months of extra time, the need for supervised release to accomplish the overall punitive effect doesn't seem quite so clear. And particularly since he's been out and been a model supervisee in the meantime, I submit that the need for further supervised release just isn't there.

The government's concern, in talking to Miss King, is that the fine be paid, and I think that's a legitimate concern and there is an outstanding fine that's still owed. But as I cite to the Court, there are ways that the fine will carry over and obviously be subject to contempt. The post-sentence administration of a fine is covered by 18 U.S.C. 3611 through [7] 3615, and the sample order I submitted to the court states that the fine previously ordered by the Court shall may remain in effect and shall be payable as directed under the post-sentence administration procedures described in those sections. So, I think the concern about a fine is a legitimate one but can be addressed even if Mr. Granderson's removed from the supervised release. Given the overall circumstances of this case, as the Eleventh Circuit said to consider, I think the need for further supervision is unwarranted and we would ask that Mr. Granderson essentially have the same

treatment as early termination, which is what we would me petitioning for here if he's gotten out in February, as the Eleventh Circuit said he should.

THE COURT: All right. Miss King.

MS. KING: Your Honor, as Mr. Smith said, the government's only concern in this matter is that the fine that the Court imposed is paid. My understanding is: of the \$2,000 fine, there's \$1,500 outstanding, and whatever is the best means by which the court believes that the fine will be paid, and will be paid, you know, without an undue burden on the government to collect it.

THE COURT: What is the real posture? The remand has been filed in this case, right?

MS. KING: Yes.

MR. SMITH: Yes, Your Honor. It's properly back before this Court.

[8] THE COURT: And when was the cert. application filed?

MR. SMITH: Judge, they sought an extension and I just got a copy of this I think Monday of this week that the cert.—

THE COURT: So, it's just filed.

MR. SMITH: —petition had just been filed.

THE COURT: All right. Obviously it won't be this term. So, if they accepted cert., it would be argued I assume next year.

MS. KING: Yes, sir.

THE COURT: Of course, you wouldn't be arguing.

MS. KING: No.

THE COURT: The Solicitor General's office would. But they've accepted it and applied for cert?

MS. KING: That's correct.

THE COURT: The Solicitor's office I mean.

MS. KING: Yes, sir.

THE COURT: There's a new solicitor already, is there not?

MR. SMITH: I don't believe so. I think it's—

MS. KING: Not that I'm aware of having been announced, Your Honor.

THE COURT: I doubt this case would swing on that personality. Most of that office—

MR. SMITH: Your Honor's correct actually.

THE COURT: —remains constant I think except for—

[9] MR. SMITH: There's an acting Solicitor General on this brief, William Bryson, so the Court is correct. I stand corrected.

THE COURT: It would be next year. I guess it's here for resentencing, or is it?

MR. SMITH: Yes, Your Honor.

MS. KING: Resentencing.

THE COURT: Well, if it got reversed again, then would it be back for resentencing again? I mean, if the cert. was accepted and the Supreme Court did as they did the last time they had the opportunity and they reversed the Eleventh Circuit in one of my cases—

MR. SMITH: I hope it won't happen here.

THE COURT: —then would it be back for resentencing again?

MR. SMITH: I believe that would be correct, Your Honor. Mr. Granderson was about—

THE COURT: He's out.

MR. SMITH: Yes, Your Honor. He was about frankly 11 days away from release to a halfway house in the 20-month sentence. He was not too far from some sort of—

THE COURT: Well, I'm more concerned right now with the procedural problem than—

MR. SMITH: Excuse me.

THE COURT: In other words, what happens? Do I [10] resentence now? Do I possibly have to resentence again later?

MR. SMITH: Judge, I think that both of those are correct. Because the mandate has been issued with directions for resentencing on the supervised release, the Court is properly here to resentence today. Should the Supreme Court accept certiorari and ultimately reverse, then it would be sent back for yet another resentencing. Or actually I guess there would be no need to resentence.

THE COURT: No. Because if they did, it would just set aside and reinstate the previous sentence.

MR. SMITH: Yes, Your Honor, that's correct.

Judge, if there's a concern about Mr. Granderson's whereabouts, I think that the court can direct him to be in touch with me on a regular basis and I could handle that. In terms of the fine, there is a fair amount still owed, but I would note that Mr. Granderson has made regular payments. He hasn't missed a one on his fine. And even though there's some unpaid, it's just because Mr. Granderson's working as a dishwasher and cook and he gets \$600 a month. I think the post-administration act would cover the payment of a fine. And as I say, he's done all the things he's supposed to do, but he's living with his parents. I mean, I don't have any reason to think he's going to be going anywhere particular.

THE COURT: You know, I always viewed probation or parole or supervised released as something a little more than or a [11] little different than punishment. It's assistance to a defendant. It's punitive also in a way, but it's guidance and to aid and help a defendant structure his life in a law-abiding way so as to be a contributing member of society. It's not unusual to get requests to terminate probation or terminate supervised release. I often look at them and wonder in some instances: what's the real motivation behind it? Is that person really saying that, "I really can't make it and I got to get out from under this thing because I don't want to go back to jail"?

MR. SMITH: Judge, I can tell you at least in this case this was not Mr. Granderson's prompting. We had told the court of appeals that it wasn't mandatory to impose it if the court reversed and they sent it back on my request. Mr. Granderson is not the one that promoted this.

THE COURT: Well, you're performing as lawyer. It may not be mandatory, but it's permissible I believe.

MR. SMITH: Judge, it is, and that's why we're here. You know, obviously the court has considered all the factors such as the cost to the government of having to supervise him as well.

THE COURT: Well, the cost to the government is worse. If he has to go back to jail or something, it's greater.

MR. SMITH: And if the Court's concerned about that, I think the court would be correct.

THE COURT: The cost is not significant if it's a matter of keeping somebody and developing somebody as a [12] law-abiding citizen who can be a contributing member of society as opposed to somebody who isn't.

MR. SMITH: If the court has a serious concern about that, I think you're correct that supervised release ought to be imposed. I guess the point that I would bring to the Court's attention is that Mr. Granderson had led a law-abiding life before this offense. This was his first offense. And his circumstances since being released have been ideal. This is the kind of candidate, it seems to me, that ought to be brought back to the Court for early termination consideration because he does seem to have—the guidance has helped him. I think the Court's correct. But he's gotten to the point now where it seems like it's no longer necessary since he's been complying with it by the letter after his first taste of jail.

A lot of people don't wake up until they see that first taste of jail, but I do believe there's some people that, once they get that first taste, walk the straight and narrow the rest of their life. Mr. Granderson seems to be that kind of person. His supervision has been such that he's done nothing, and there's no reason that I can see, and I don't think that the probation officer sees either, to continue him under the continued government cost of supervision. But if the court has some concern about that, I think it would be—the court's correct. I think supervised release, that's what it's here for. I just don't see anything that suggests that there's any further need at

[13] this point, particularly since he's gotten five months more than the Eleventh Circuit said he was supposed to.

There's a—I know I keep talking here. There's a last thing I'll say and then I'll be quiet. It seems to me the purpose of the early termination is to set an incentive for folks to turn around and do things right, and I think that the way in which Mr. Granderson has performed perfectly since being on supervision ought to be rewarded to some extent with early termination. I think that's what the purpose of early termination is. It does disrupt your life. The court's right. It gives guidance, but it does disrupt your life. You've got to report regularly, you got to send in monthly reports, you have to follow a lot of regulations and procedures that obviously you and I don't have to follow, and it is something of a pain to have to follow all those rules and regulations. It's obviously warranted when there's a need. I guess I just am not sure there's a need anymore. That's why I'm back before the court.

THE COURT: All right. Anything further?

MR. SMITH: Just the probation officer doesn't seem to see any need for this, and the government, unless the court feels there's a need for a fine to be enforced through continued supervision, also doesn't see any need. I submit to the court there isn't any need to keep Mr. Granderson under these responsibilities.

THE COURT: The probation officer doesn't see any need [14] for this?

THE PROBATION OFFICER: Your Honor, I think he may be speaking of the one in Virginia. I've never said that.

MR. SMITH: Just, Judge, in Mr. Wolinski's conduct report, he understands it's back for resentencing on the issue of whether there should be a vacating or early termination of supervised release order. His next paragraph then talks about how Mr. Granderson has made a satisfactory adjustment, has done everything he's sup-

posed to. I think if Mr. Wolinski felt there was a further need, he would have stated it at that point of his letter. The letter was sent sometime ago. It was back in January. But the probation officer expressed no belief that continued supervision was necessary for Mr. Granderson.

THE COURT: When would the period of probation have expired had he continued on probation?

MR. SMITH: Judge, that would have been longer than after the revocation. Four to five years of supervision.

THE PROBATION OFFICER: His expiration date—

THE COURT: Would have been 1996, wouldn't it?

THE PROBATION OFFICER: Right, Your Honor. March 17th of 1996.

MR. SMITH: Obviously if he'd gotten a third of that, I would have come—and had been performing adequately, I would have come and asked for early termination at that point. Probably would have been right about this time I believe. Almost [15] a year and two-thirds would be about where we are now.

THE COURT: The point is he hasn't performed satisfactorily. We had to revoke it.

MR. SMITH: Judge, I understand that and obviously that's why we're here. At the time, his revocation was for five months more than he was supposed to get in prison. I think he's paid for that revocation adequately. And the court, this court, at the time it revoked him, expressed concerns about how it didn't seem—under the circumstances, that it seemed like an awfully harsh sentence, even by this Court's standards, and I think that that was the case. It was not the sort of time that the court wanted to give, and yet that's the amount of time that he did end up getting before the eleventh circuit reversed. I think he's paid for that.

And, you know, jail time, first taste of jail, has done the trick here, and that's why I'm submitting this to the Court. Mr. Granderson has learned his lesson, Judge.

He hasn't done anything. It's woken him up and he's performed perfectly since that time. And as I say, the probation officer doesn't seem to have any feelings that further supervision's necessary.

THE COURT: All right. In case number 91-1, United States versus Ralph Stuart Granderson, Jr., the Court having already found there was a violation of the conditions of probation and the court already having determined that the probation should be revoked, it is hereby adjudged that the [16] defendant, Ralph Stuart Granderson, Jr., should be committed to the custody of the Bureau of Prisons for a period of six months. Parenthetically stating, that time already having been served, there's no further time to be served, parenthesis. To be followed by a period of supervised release of two years, said supervised release to be under the standard provisions as adopted by this Court. And in addition thereto and specifically, the defendant's prohibited from possessing a firearm or other dangerous weapon.

The defendant, it it's determined by the probation office that he should do so, shall participate in a substance abuse program until released by the probation office. And in addition thereto, the fine, the balance of the fine imposed in the original sentence of March 18, 1991, is a special condition. Payment of that fine is a special condition of supervised release, and that fine should be paid in full no later than six months prior to the expiration of the period of supervised release, to be paid on a regular basis to be worked out with him and the probation officer, but in no event should it run beyond the six months immediately preceding the expiration of supervised release. Anything further?

MR. SMITH: Judge, just one other thing. The court of appeals—we asked for the supervised release period to begin to run at the end of the six months and they said it wouldn't be that way, so I just want to make sure that—

[17] THE COURT: No, I'm contemplating two years. I'd previously imposed three years.

MR. SMITH: Yes, Your Honor, and I appreciate that.

THE COURT: And I'm imposing two years and I think that can run from now. I think that's what's contemplated. And you probably need that much for him to get that fine paid out within the time period I'm talking about. I can always release him from it later on if it was justified, but that's the sentence of the court at this time.

MR. SMITH: Judge, he's been under supervised release since August, the Court noted.

THE COURT: Even if you add all of that, that's still less than three years.

MR. SMITH: Yes, Your Honor. That's what I'm trying to determine.

THE COURT: All right. Anything further?

MS. KING: Nothing further.

THE COURT: All right. Now, we had—yes, sir.

MR. SMITH: I suppose Jones objections. The Court I assume, when it says making payments due six months in advance, is not inconsistent with Mr. Granderson's ability to pay.

THE COURSE: Of course not.

MR. SMITH: Okay. No objections then.

THE COURT: All right.

(Hearing concluded)

SUPREME COURT OF THE UNITED STATES

No. 92-1662

UNITED STATES, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ORDER ALLOWING CERTIORARI

Filed June 28, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

June 28, 1993